Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In The
SUPREME COURT OF THE UNITED STATES

October Term 1977

No.

77-247

HELEN FOLEY, Petitioner

v.

STATE OF NEW JERSEY, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
NEW JERSEY SUPERIOR COURT,
APPELLATE DIVISION

HELEN FOLEY, pro se
614 Morris Boulevard
Toms River, New Jersey
08753

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IN THE SUPREME COURT OF THE UNITED STATES

October Term,1977

No.

HELEN FOLEY, Petitioner

v.

STATE OF NEW JERSEY, Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE NEW JERSEY SUPERIOR COURT,
APPELLATE DIVISION

Helen Foley, pro se, respectfully requests that a writ of certiorari issue to review the decision of the New Jersey Superior Court, Appellate Division entered in the above-captioned case on February 23,1977.

OPINIONS BELOW

The orders of the Supreme Court of New Jersey dismissing the appeal and denying petition for certification, dated 17 May 1977 appear in the Appendix hereto at Appendix A1,A2.

The decision of the New Jersey Superior Court, Appellate Division, dated February 23,1977 appears in the Appendix at Appendix B.

The transcript of Contempt Hearing of petitioner before Judge George Y Schoch,A. J.S.C., Mercer County Courthouse, Trenton New Jersey on June 16,1976. (Pages 1,2, 3,7, including the finding of guilty of Contempt of Court) Appendix C

JURISDICTION

The orders of the Supreme Court of New Jersey dismissing the appeal and denying petition for certification was entered on May 17,1977 and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Where a citizen of the United States is about to be charged with contempt of court (not in the presence of the court) in a State wherein the court rules entitle her to receive notice of such charge by an order to show cause or order for arrest, does the disregarding of such rule and the noticing of such citizen by letter from the hearing judge violate her right to notice under the due process clause of the Fourteenth Amend-

ment to the United States Constitution?

2. Under the circumstances of 1. above, does the conviction of the defendant at such hearing (in absentia) violate the requirements of the due process clause of the Fourteenth Amendment in that she was not given an opportunity to be heard ?

CONSTITUTIONAL AND COURT RULES INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that "; nor shall any State deprive any person of life,liberty,or property, without due process of law;..."

"New Jersey Court Rules:

1:10-1 Contempt in Presence of Court

Contempt in the actual presence of a judge may be adjudged summarily by the judge without notice or order to show

cause. The order of contempt shall recite the facts and contain a certification by the judge that he saw or heard the conduct constituting the contempt.

1:10-2 Institution of Proceedings

Every other summary proceedings to punish for contempt shall be on notice and instituted only by the court upon an order for arrest or an order to show cause specifying the acts or omissions alleged to have been contumacious. The proceedings shall be captioned "In the Matter of ____ Charged with Contempt of Court."

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to review a decision of the Superior Court of New Jersey, Appellate Division affirming the decision of Judge George Y.Schoch of the Superior Court of New Jersey who found petitioner guilty of contempt

of court at an (in absentia)hearing on 16 June 1976 and fined her $25.00 on 30 June 1976. (Appendix C , page 26)

The matter stems from a parking ticket returnable in the Borough of Princeton, New Jersey which was returned, with check, and with certain words or resemblances to words written on both sides. On 5 April 1976 petitioner appeared in Princeton Borough Court in answer to correspondence from the court clerk at which time and place she was notified by Municipal Judge Philip S.Carchman that she would be charged with contempt of court for the language on the ticket. When asked if she pleaded guilty or not guilty she said not guilty.

On 20 May 1976 she received a letter from Judge Schoch (Appendix D) directing her to appear and answer charges of contempt of court by Judge Carchman.

On 16 June 1976 she was tried and found guilty of contempt of court (in absentia) and without Judge Carchman appearing as a witness.

Having heard in the press that a bench warrant was being issued for her arrest she appeared before Judge Schoch on 30 June 1976 with counsel under the impression that it was the trial instead of the sentencing. She was fined $25.00 which was paid.

On 30 July 1976 she filed a Notice of Appeal to the Appellate Division Of the Superior Court. On 23 February 1977 the decision of the Appellate Division was entered affirming the finding of guilty.

On 15 March 1977 petitioner filed a Notice of Appeal and Notice of Petition for Certification to the Supreme Court of New Jersey which were denied on 17 May 1977.

Petitioner now petitions this Court for a writ of certiorari to review the decision of the Superior Court, Appellate Division.

REASONS FOR GRANTING THE WRIT

I WHERE A CITIZEN, ABOUT TO BE CHARGED WITH CONTEMPT OF COURT (NOT IN THE PRESENCE OF THE COURT) IS ENTITLED BY THE STATE COURT RULES TO RECEIVE NOTICE OF SUCH CHARGE BY ORDER OF ARREST OR AN ORDER TO SHOW CAUSE, THE NOTICING OF SUCH INDIVIDUAL BY LETTER OF THE HEARING JUDGE IS A VIOLATION OF HER RIGHT TO NOTICE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

New Jersey Court Rule 1:10-1 states:

> "1:10-1 Contempt in Presence of Court
> Contempt in the actual presence of a judge may be adjudged summarily without notice or order to show cause. The order of contempt shall recite the facts and contain a certification by the judge that he saw or heard the conduct constituting the contempt."

The letter of the hearing judge (Appendix D) states, " I have been advised by Judge Carchman that he has charged you

with Contempt of Court..."

It is patent then that the contempt charged is not one in the presence of the court or the municipal judge would have disposed of it summarily in his own court.

Therefore Rule 1:10-2 must apply, which states:

" 1:10-2. Institution of Proceedings

Every other summary proceeding to punish for contempt shall be on notice and instituted only by the court upon an order for arrest or an order to show cause specifying the acts or omissions alleged to have been contumacious. The proceedings shall be captioned "In the Matter of _____ Charged with Contempt of Court."

The meaning of this rule was confirmed and the importance of its procedural aspect was emphasized in Lusardi v. Curtis Point Prop. Owners 138 N.J. Super 44 (App. Div.1975) wherein the court stated at 49:

"That the proceeding below was patently deficient for the purpose of a contempt citation and incapable of sustaining a judgement of contempt is manifest... A contempt proceeding may only be instituted by the court "upon an order for arrest or an order to show cause specifying the acts or omissions alleged to have been contumacious."

And in Zoning Board of Adjustment of Green Brook v. Datchko 142 N.J. Super. 501 (App. Div. 1976) it states at 509:

" A contempt conviction under R. 1:10-2 may not be predicated on the provisions of this order to show cause. (involving supplementary relief to a litigant) The proceeding under that rule is penal in nature. A defendant charged thereunder must be afforded all of the rights of one charged with a crime except the right to indictment and to trial by jury."

(emphasis added)

In the instant case notice was instituted by a letter of 19 May 1976 from the trial judge George Y. Schoch (Appendix D) Because the matter is penal in nature

(GreenBrook,supra) petitioner contends that the rule must be strictly complied with, in her favor.

> "Penal statutes and regulations must be strictly construed."
>
> State v. Pinto 129 N.J.L.255, 258

The matter is similar to the "statutory entitlement" issue in Goldberg v. Kelly 397 U.S. 254 (1969) which, although not penal in nature, did involve a due process question of whether an evidentiary hearing was required before a welfare recipient's benefits were terminated by the State. It states at 262:

> "Such benefits are a matter of statutory entitlement for persons qualied to receive them. (8) Their termination involves state action that adjudicates important rights.
>
> Note (8) in part: "It may be realistic today to regard welfare entitlements as more like "property" than a "gratuity"

and at 267:

> "The fundamental requisite of due process of law is the opportunity to be heard. Grannis v. Ordean, 234 U.S. 385,394 (1914) The hearing must be "at a meaningful time and in a meaningful manner". Armstrong v. Manzo, 380 U.S. 545,552 (1965) In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally."

And in New Jersey the rule making power of the Supreme Court in the procedural area is not subordinate to any overriding legislation. In Winberry v. Salisbury 5 N.J. 240,255 (1950) it states:

> "We therefore conclude that the rule-making power of the Supreme Court is not subject to overriding legislation, but that it is confined to practice, procedure and administration as such."

Petitioner contends that an entitlement under the Court Rules is the equivalent of one under a State statute and because it has to do with procedural rights of a

matter which is "penal in nature" it must be strictly construed. Therefore the failure to institute this proceeding by an order to show cause was so deficient that her right to notice under the due process clause of the Fourteenth Amendment was violated.

II THE HOLDING OF A TRIAL UNDER CIRCUMSTANCES OF I ABOVE IN WHICH PETIONER WAS CONVICTED OF CONTEMPT OF COURT (IN ABSENTIA) FURTHER VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AS IT RELATES TO THE OPPORTUNITY TO BE HEARD IN THAT SHE WAS NOT AFFORDED AN OPPORTUNITY TO PRESENT EVIDENCE IN HER OWN DEFENSE; HER ABSENCE BEING PROPER UNDER THE PERTINENT RULE OF PROCEDURE OF R. 1:10-2.

In Hyman v. Muller 1 N.J. 124(1948 it states at 129:

> "The essential elements of"due process of law" as guaranteed by the Fourteenth Amendment of the Federal Constitution, are appropriate notice of the judicial action and adequate opportunity to be heard. Blackmer v. United States, 284 U.S. 421, 52 S.Ct. 252,76 L.Ed.375(1932).

> Procedural due process contemplates a trial according to some settled course of judicial proceedings.... It is designed to shield the litigant against arbitrary action in disregard of essential right and justice. It means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. Westervelt v. Gregg 12N.Y. 202,209; Brown v. New Jersey, 175 U.S. 172,2o S.Ct. 77, 44L.Ed. 119 (1899)."

The absence of the petitioner from the trial was not voluntary and wilful in the sense that it warranted her being tried in absentia because she had not been properly served according to the Rules of Court, and the matter being penal in nature the rules must be strictly complied with in petitioner's favor. Therefore, the holding of such trial in her absence (without the proper procedure relative to notice having been followed) violated her right to an opportunity to be heard under the Fourteenth Amendment.

And again in Hyman (supra) at 129 it states:

> "Due process in judicial proceedings implies action in conformity with the general law, based upon evidence, and after a full hearing upon notice to the parties affected and opportunity to be heard. Judgment without such citation and opportunity to be heard lacks the very attributes of a judicial determination. Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330,78 L.Ed.674 (1933). There is no hearing when the affected party has not the means of knowing what evidence is offered or considered and is not afforded an opportunity to test, explain or refute it." (emphasis added)

The reasons for the setting forth of such procedure in the Rules dealing with contempt, not in the presence of the court are expressed by the New Jersey Supreme Court in In re Contempt of Carton 48 N.J. 9,22:

> "The reasons are, first, that there is no need to deal so abruptly with an offense which does not constitute an obstruction within the courtroom itself, and second, that since the court does not know by its own senses all of the facts constituting the

> offense,there must be a trial to adduce them. R.R. 4:87-2 (source of R:1:10-2) and 4 vest the authority to institute a penal prosecution exclusively in a judge of the offended court, rather than in a litigant, and provide for clear notice of the nature of the proceedings and for safeguards appropriate in a prosecution of that kind."

In the instant case, petitioner had not been afforded an opportunity to present evidence in her own defense, the most important of which would have been on that issue of intent to commit contempt. In Lusardi (supra) at 49, it states:

> "We observe, for instance, that demonstration of a mens rea, wilful disobedience and lack of concern for the order of the court, is necessary for a finding of contempt, but irrelevant in a proceeding designed simply to enforce a judgement on a litigant's behalf."

As to this point, petitioner contends that the evidence as presented at the trial in her absence, standing alone- words addressed to no one in particular on a paid

parking ticket, which, as far as any lay member of the public could know would ever be seen by anyone except a clerk in the administrative process- does not prove the necessary mens rea beyond a reasonable doubt.

As further evidence that her absence from the trial was based on principle and faith in the essential fairness of the American judicial system is that she did appear with counsel at the 30 June hearing under the mistaken belief that she was appearing for trial, after having learned through the press that a bench warrant for her arrest was being issued. It was not until some time after 30 June that she realized that it had been a hearing for sentencing only.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted

Helen Foley, pro se

Helen Foley

Dated 11 August 1977

APPENDIX A-1

SUPREME COURT OF NEW JERSEY

13,559 SEPTEMBER TERM 1976

IN THE MATTER OF	:	
HELEN FOLEY	:	ORDER DISMISSING APPEAL
Plaintiff- Appellant	:	

This matter having been duly presented to the Court, it is ORDERED that the appeal is dismissed pursuant to Rule 2: 12-9.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 17th day of May, 1977.

Florence R. Peskoe
Clerk

A TRUE COPY
Florence R.Peskoe
Clerk

Filed
May 17,1977
Florence R.
Peskoe

BEST COPY AVAILABLE

APPENDIX A-2

SUPREME COURT OF NEW JERSEY
C-712 SEPTEMBER TERM 1976

IN THE MATTER OF HELEN FOLEY	:	ON PETITION FOR CERTIFICATION
PLAINTIFF-PETITIONER	:	

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereby ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Worrall F. Mountain, Presiding Justice, at Trenton, this 17th day of May,1977.

Florence R. Peskoe
Clerk

A TRUE COPY

Filed
May17,1977

Florence R. Peskoe
Clerk

Florence R. Peskoe

APPENDIX B

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4349-75

IN THE MATTER OF
HELEN FOLEY,

CHARGED WITH CONTEMPT OF COURT.

Submitted February 8,1977 -Decided
Feb.23,1977

Before Judges Halpern, Allcorn and
Botter

On appeal from Superior Court, Law Division, Mercer County.

Mrs. Helen T. Foley, appellant, pro se.

Mr. William F. Hyland, Attorney General of New Jersey, attorney for respondent (Mr. Robert E. Rochford, Deputy Attorney General, of counsel; Mr. Daniel A. Swick Deputy Attorney General, on the brief)

PER CURIAM

Appellant was found guilty of contempt of court and was fined $25.00. On this appeal she contends that she was not afforded appropriate notice and an opportunity to be heard. She also contends that the proofs did not establish her guilt beyond a reasonable doubt.

Clearly, appellant's conduct in inscribing a parking ticket with an obscene

ity and other disparaging remarks, which she sent to the municipal court, accompanied by a $4.00 check, constituted a contempt of court. State v. Sax, 139 N.J. Super. 157(App. Div. 1976). This was followed by additional insults contained in a letter addressed to the judge before whom the contempt hearing was scheduled, in which letter she stated that she would not appear at the scheduled hearing.

In these circumstances we find no merit to appellant's contentions on this appeal, apart from the fact that these contentions were not urged below by appellant's attorney who appeared with her at sentencing. R. 2:10-2.

Affirmed.

A TRUE COPY

Elizabeth McLaughlin
Clerk

APPENDIX C Page 1

MAGISTRATES COURT
BOROUGH OF PRINCETON
MERCER COUNTY
NEW JERSEY
(A-4349-75)

STATE OF NEW JERSEY :

vs :

HELEN FOLEY, :
Defendant.

:

TRANSCRIPT
OF
CONTEMPT HEARING

B E F O R E:

HONORABLE GEORGE Y. SCHOCH, A.J.S.C
Mercer County Courthouse
Trenton, New Jersey

June 16,1976

A P P E A R A N C E S:

Mason,Griffin & Pierson
by: BENJAMIN N. CITTADINO, ESQ.
For the State of New Jersey

NO APPEARANCE
For Defendant

Miriam M. Bard, C.S.R.
Official Court Reporter
Trenton, N.J.

I N D E X

WITNESSES	DIRECT	CROSS
ANN COLUCCIO		
By Mr. Cittadino	3	
The Court	4	

E X H I B I T S

NUMBER	DESCRIPTION	EVID.
J-1	Letter	2
S-1	Ticket	3
S-2	Check	3

THE COURT: We have the matter of State vs. Helen T. Foley, charged with Contempt of Court in the Municipal Court in the Bor ough of Princeton.

I wrote Mrs. Foley on May19, 1976, advising her that this matter would be heard this morning at 9.00. Is Mrs. Foley in the Courtroom?

(There was no response)

THE COURT: That doesn't surprise me in light of the letter of May 21,1976, which indicates, among other things, that she is not coming.

I will have this letter marked as Exhibit J-1.

(The letter referred to above was received and marked J-1 in Evidence as of this date)

THE COURT: Would you be good enough to proceed and present whatever evidence you have of the Contempt, please? I will then take it from there.

MR. CIIADINO: Very well, your Honor.

We would just call Ann Coluccio.

ANN COLUCCIO, a witness, called on behalf of the State.

Mrs. Foley, in the Court's opinion, deliberately took this method of invoking this kind of procedure.

I have received other correspondence from her which was prior to this instance, but subsequent to my finding certain college students guilty of contempt for similar types of activities, apparently all of the Borough of Princeton's Municipal Court and Mrs. Foley took umbrage in my rulings in those cases and I think that the language where she says on the ticket: "Fine me $50.00 I am older and fatter than the long-haired hippies."

There is an indication to the Court that she deliberately invoked this procedure. That conclusion is substantiated of the contents of her letter of May 21 in which she advised the Court that she had no intention of appearing and that suggested the Court engage in certain activities with the letter which is against nature. Consequently I find Mrs. Foley guilty of Contempt.

I will postpone sentencing until she is before me and a bench warrant will be issued for her arrest.

(emphasis added)

APPENDIX D

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION

GEORGE Y SCHOCH
Assignment Judge

Mercer, Hunterdon and Somerset Counties

May 19,1976

Mrs. Helen Foley
1432 Riverside Drive
Trenton, New Jersey 08618

Dear Mrs. Foley:

I have been advised by Judge Carchman that he has charged you with Contempt of Court as a result of your written comments on the parking ticket you received.

Please be advised that I will hear this matter on Wednesday, June 16,1976, at 9:00 a.m. and direct that you appear in my courtroom at that time. If you are represented by counsel or intend to be, please notify your attorney of this hearing date.

Very truly yours,

George Y. Schoch
A.J.S.C.

GYS:mt
CC: Judge Philip S. Carchman

CERTIFICATE OF SERVICE

I hereby certify that on the 11 day of August 1977 three copies of the petition for Writ of Certiorari were mailed at the Trenton Post Office, Trenton, New Jersey, first class mail to the following: William F. Hyland, Attorney General of the State of New Jersey State House Annex Trenton, New Jersey 08625, Court Clerk, Borough of Princeton, Princeton Borough Hall, Princeton, New Jersey 08540 and Benjamin N. Cittadino, Esq., Mason, Griffin &Pierson 201 Nassau Street Princeton, New Jersey 08540

Helen Foley, pro se

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IN THE

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OCTOBER TERM, 1977

No. 77-247

HELEN FOLEY,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Superior Court of New Jersey Appellate Division

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-247

HELEN FOLEY,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Superior Court of New Jersey Appellate Division

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The orders of the Supreme Court of New Jersey, not yet reported, appear in petitioner's appendix, pp. 19 and 20. The opinion of the Superior Court of New Jersey, Appellate Division, not reported, appears in petitioner's appendix, p. 21.

Statutes and Rules Involved

N.J.S.A. 2A:10-1

The power of any court of this state to punish for contempt shall not be construed to extend to any case except the:

a. Misbehavior of any person in the actual presence of the court;

b. Misbehavior of any officer of the court in his official transactions; and

c. Disobedience or resistance by any court officer, or by any party, juror, witness or any person whatsoever to any lawful writ, process, judgment, order, or command of the court.

Nothing contained in this section shall be deemed to affect the inherent jurisdiction of the superior court to punish for contempt.

New Jersey Court Rule 1:10-1

Contempt in the actual presence of a judge may be adjudged summarily by the judge without notice or order to show cause. The order of contempt shall recite the facts and contain a certification by the judge that he saw or heard the conduct constituting the contempt.

New Jersey Court Rule 1:10-2

Every other summary proceeding to punish for contempt shall be on notice and instituted only by the court upon an order for arrest or an order to show cause specifying the acts or omissions alleged to have been contumacious. The proceeding shall be captioned "In the Matter of ———— Charged with Contempt of Court."

Statement of the Case

On January 14, 1976, petitioner received a parking ticket in Princeton, New Jersey. She returned the ticket to the court with an obscenity written on it. Upon receipt of this summons, Judge Philip S. Carchman of the Municipal Court in the Borough of Princeton ordered defendant to appear in court. A hearing was held on April 5, 1976, during which Judge Carchman informed petitioner that she had been ordered to appear in court because the obscenity she had written on the parking ticket was contemptuous of the court. Petitioner stated that she understood the charge against her and entered a plea of not guilty. The court advised petitioner that the contempt charge would be heard by another judge and that she would be notified as to the date and location of that proceeding at a later date.

In a written correspondence dated May 19, 1976, the Honorable George Y. Schoch, Assignment Judge of the Superior Court of New Jersey, informed petitioner that he would conduct a hearing on her contempt charge on June 16, 1976 in Trenton. In a letter dated May 21, 1976, petitioner advised Judge Schoch that she would not appear at this hearing.

At the June 16 hearing, unattended by petitioner, the parking ticket returned by petitioner was identified and entered into evidence. Across the face of the ticket the following words were written: "'Mutha Fuck A!', Fine me $50—, (I'm older and fatter than the long haired hippie!), H. Foley." The court found petitioner guilty of contempt of court.

A sentencing hearing was held by Judge Schoch on June 30, 1976. Petitioner was in attendance and was fined $25. Petitioner filed a Notice of Appeal to the Ap-

pellate Division of the Superior Court of New Jersey on July 30, 1976. On February 23, 1977, the Appellate Division affirmed petitioner's conviction. A petition for certification to the Appellate Division and an appeal from the decision of the Appellate Division were filed by petitioner with the Supreme Court of New Jersey on March 15, 1977. The Supreme Court denied the petition and dismissed the appeal on May 17, 1977. On August 12, 1977 petitioner filed with this Court a petition for writ of certiorari.

REASONS FOR DENYING CERTIORARI

POINT I

Petitioner was given sufficient notice of the contempt charge to satisfy the requirements of due process.

Petitioner contends that the notice she received apprising her that she had been charged with contempt of court and that a hearing on this charge had been scheduled was insufficient pursuant to the New Jersey Court Rules. This alleged insufficiency, she claims, violated her right to due process of law under the Fourteenth Amendment. Respondent submits that the notice given petitioner was in accordance with the New Jersey Court Rules and was clearly consistent with due process.

In contempt proceedings, due process of law requires that a defendant be advised of the charges against him and afforded ample opportunity to appear and be heard with regard to those charges. *Taylor* v. *Hayes,* 418 U.S. 488, 498 (1974); *Groppi* v. *Leslie,* 404 U.S. 496 (1972); *In re Oliver,* 333 U.S. 257 (1948); *Fisher* v. *Marubeni*

Cotton Corp., 526 F.2d 1338, 1342 (8 Cir. 1975); *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor & Aroostook R. Co.,* 380 F.2d 570, 581-582 *cert. den.* 389 U.S. 327 (1967). The notice provided in such cases must be sufficient to inform the defendant of the nature and particulars of the charge against him and to enable him to appear and be heard on that charge. *Blackmer* v. *United States,* 284 U.S. 421, 440 (1932); *Cooke* v. *United States,* 267 U.S. 517 (1924); *Yates* v. *United States,* 316 F. 2d 718 (12 Cir. 1963) *Cf. Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314-315 (1950). See also *F.R.C.P.* 42(b).

The courts, however, have repeatedly emphasized that due process is concerned with the fundamental fairness of governmental action. *Mitchell* v. *W.T. Grant Co.,* 416 U.S. 600, 610 (1974); *Bolling* v. *Sharpe,* 347 U.S. 497 (1954); *Foster* v. *People of the State of Illinois,* 332 U.S. 134 (1947); *Inland Empire Council* v. *Millis,* 325 U.S. 697, 710 (1945). The Due Process Clause of the Fourteenth Amendment does not require or guarantee a particular procedural form in the state courts. *Hardware Dealers' Mutual Fund Ins. Co. of Wisconsin* v. *Glidden Co.,* 284 U.S. 151 (1931); *Wood* v. *Conneaut Lake Park, Inc.,* 258 F. Supp. 777, 779 (W.D. Pa. 1966), aff'd 386 F.2d 121 (3 Cir. 1967), *cert.* den. 391 U.S. 907 (1968). In determining the constitutional adequacy of notice in state proceedings, the federal courts look to the practical realities of the circumstances of each particular case to determine if the procedure utilized is sufficient. *Mitchell* v. *W.T. Grant, supra; Palmer* v. *Columbia Gas of Ohio,* 479 F.2d 153, 170 (6 Cir. 1973).

Respondent submits that the notice afforded petitioner in the instant case clearly satisfied the requirements of due process. Petitioner appeared at a Municipal Court hear-

ing after the return of her parking ticket, and was informed that she was being charged with contempt of court for the language she had written on the summons. She subsequently received a letter from a Superior Court judge apprising her again of the charge against her, and specifying the time and place of the hearing to be held on that charge. It is clear, furthermore, that petitioner received actual notice of this hearing, because she informed the court by letter that she would not appear at that proceeding.

Petitioner contends, nonetheless, that she was denied due process because the notice provided her did not comply with the applicable New Jersey Court Rules. R. 1:10-1 provides:

> Contempt in the actual presence of a judge may be adjudged summarily by the judge without notice or order to show cause. The order of contempt shall recite the facts and contain a certification by the judge that he saw or heard the conduct constituting the contempt.

R. 1:10-2 provides:

> Every other summary proceeding to punish for contempt shall be on notice and instituted only by the court upon an order for arrest or an order to show cause specifying the acts or omissions alleged to have been contumacious . . .

Defendant argues that her allegedly contemptuous conduct was not committed in the presence of the court, and therefore her contempt proceedings could only have been instituted by the court upon an order to show cause. The court below did not specify which of the above rules it proceeded under. The decisions of other New Jersey

Courts, however, clearly indicate that the procedure referred to in R. 1:10-2 was not required in the instant case.

Under R. 1:10-1 and the New Jersey contempt statute,* contempt committed in the "actual presence" of the court may be dealt with without an order to show cause. The New Jersey judiciary has consistently given this phrase a broad construction and has held that this language contemplates more than just contemptuous conduct engaged in while the judge is presiding in the courtroom. *McAllister* v. *McAllister,* 95 N.J. Super. 426, 434, 231 A.2d 394 (App. Div. 1967); *In re Jenkinson,* 93 N.J. Eq. 545, 546, 118 A. 240 (Ch. Div. 1922); *In re Merrill,* 88 N.J. Eq. 261, 275, 102 A. 400 (Prerog. Ct. 1917). In *State* v. *Gussman,* 34 N.J. Sup. 408, 172 A.2d 565 (App. Div. 1955), the defendant was convicted of contempt for writing and mailing a letter to the judge. The court stated that contempt in the "actual presence of the court" encompasses acts outside the courtroom, and it held that the mailing of this letter to the court was in the court's actual presence. *Gussman, supra* at 415, 417. The recent decision of *State* v. *Sax,* 139 N.J. Super. 157, 353 A.2d 113 (App. Div. 1976), is directly on point and dispositive of the instant case. In *Sax,* defendant was convicted of contempt for returning a parking ticket to the clerk of the court accompanied by a letter containing an obscenity. The court, in the initial paragraph of its opinion, stated that the contempt was properly prosecuted under R. 1:10-1. *Sax, supra* at 158. The municipal court had certified the language of the

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* N.J.S.A. 2A:10-1, which defines the substantive offense of contempt provides in part:

> The power of any court of this state to punish for contempt shall not be construed to extend to any case except the (a) Misbehavior of any person in the actual presence of the court . . .

letter, heard defendant and his attorney and then found him guilty of contempt. The *Sax* Court emphasized that an act of contempt may occur "in the presence of the court" even though the judge himself did not see or hear the contemptuous act at the instant it was committed by the defendant. *Sax, supra* at 160. It is thus clear that the court below, in notifying petitioner of the charge and the hearing in question, was not required to proceed in the manner claimed by petitioner.

Even assuming that petitioner's contempt proceedings should have been instituted by an order to show cause pursuant to R. 1:10-2, the procedure employed below did not deny her due process of law and would not warrant the granting of a petition for writ of certiorari. In *Van Sweringen* v. *Van Sweringen,* 22 N.J. 440, 444, 126 A.2d 334 (1956), the New Jersey Supreme Court stated that the crucial emphasis in contempt proceedings should be placed upon notice and a fair hearing. A court should examine whether the notice a defendant received of the contempt hearing adequately informed him of the charges. Rigid adherence to every procedural dictate of R. 1:10-2 is unnecessary as long as the spirit of that Rule has been satisfied. *Board of Education of Newark* v. *Newark Teachers Union,* 114 N.J. Super. 306, 317, 276 A.2d 175, (App. Div. 1971), certif. den. 58 N.J. 605 (1971), *cert. den.* 404 U.S. 950 (1971). The court in *Van Sweringen, supra,* ruled that minor irregularities in the preliminary procedural steps do not justify a reversal unless some substantial prejudice is suffered by a defendant. See *Van Sweringen* v. *Van Sweringen,* 34 N.J. Super. 394, 402, 112 A.3d 584 (App. Div. 1955), rev'd on other grounds 22 N.J. 446 (1956).

This Court has also expressly held that technical accuracy in the contempt procedure is not required. In

United States v. *United Mine Workers,* 330 U.S. 258 (1947) it was argued that the defendants were not properly notified that they had been charged with contempt in federal district court. The Supreme Court responded that the federal rule dealing with contempt "requires no such vigorous application, for it was designed to insure a realization by contemnors that a prosecution for criminal contempt is contemplated. Its purpose was sufficiently fulfilled here, for this failure to observe the rule in all respects has not resulted in substantial prejudice to the defendants." *Id.* at 297-298. See also *United States* v. *Handlin,* 476 F.2d 709, 712-713 (2 Cir. 1973); *Allen* v. *United States Fidelity and Guaranty Co.,* 342 F.2d 951, 956 (9 Cir. 1965).

Even if the notification in question had resulted in a clear violation of state law, a petition for writ of certiorari would not be warranted. As indicated above, the procedure utilized satisfied the constitutional requirement of due process. Once this has been established, the fact that the procedure may have violated state law, will not be considered by this Court. *Gryger* v. *Burke,* 334 U.S. 728, 731 (1948); *Patterson* v. *Colorado,* 205 U.S. 454 (1907).

Respondent submits that the procedure employed by the court below to notify petitioner of the charge against her was consistent with due process of law and the New Jersey Court Rules. Her petition for a writ of certiorari should therefore be denied.

POINT II

Petitioner's guilt of contempt of court was established beyond a reasonable doubt.

Petitioner argues that her guilt of contempt of court was not established at the proceeding below. Specifically she contends that it was never demonstrated that she possessed the requisite intent to commit the contempt in question. Respondent submits that petitioner's guilt was established beyond a reasonable doubt.

Contempt has been defined as:

> . . . a disobedience of the court by acting in opposition to its authority, justice and dignity. It comprehends any act which is calculated to or tends to embarrass, hinder, impede, frustrate, or obstruct the court in the administration of justice, or which is calculated to or has the effect of lessening its authority or its dignity; or which interferes with or prejudices parties during the course of litigation; or which otherwise tends to bring the authority and administration of the law into disrepute or disregard. In short, any conduct is contemptible which bespeaks of scorn or disdain for a court or its authority. *In re Callan,* 122 N.J. Super. 479, 494 (Ch. Div. 1973), aff'd 126 N.J. Super. 103 (App. Div. 1973), rev'd on other grounds 66 N.J. 401 (1975). See also *United States* v. *Ross,* 243 F.Supp. 496, 499 (S.D. N.Y. 1965), *In re Mengel,* 201 F.Supp. 687, 689 (W.D. Pa. 1962).

It is well settled that an individual can be convicted of contempt for directing abusive or obscene language to the court. *Mayberry* v. *Pennsylvania,* 400 U.S. 455 (1971); *Illinois* v. *Allen,* 397 U.S. 337, 346 (1970); *United States* v. *Bollenbach,* 125 F.2d 458, 460 (2 Cir. 1942); *State* v. *Gonzalez,* 134 N.J. Super. 472, 341 A.2d 673 (App. Div. 1975). The words written across petitioner's parking ticket were directed to the court and were clearly vulgar and abusive. The dignity of the court was certainly thereby impaired.

Petitioner contends that her intent to commit contempt was never established. Intent is an element of the offense of contempt of court. *United States* v. *Seale,* 461 F.2d 345, 368 (7 Cir. 1972); *United States* v. *Meger,* 346 F. Supp. 973, 977 (D.D.C. 1972). This element is established, however, merely by showing that the conduct in question was done willfully. The defendant need not have known that he was violating the law. He must only have intended to do what he did, so that his misconduct did not occur by accident or inadvertence. *Finn* v. *United States,* 219 F.2d 894 (9 Cir. 1955), *cert.* den. 349 U.S. 906 (1955); *Dennis* v. *United States,* 171 F.2d 986 (D.C. Cir. 1949) Supp. 222, 226 (C.D. Cal. 1971). At the contempt hearing the court concluded that petitioner had deliberately invoked the bizarre procedure used to return her summons. This finding was buttressed by the letter sent to the court stating that petitioner would not appear at the hearing. That letter contained an insulting command directed to the presiding judge. It is thus clear that petitioner engaged in a willful act of contempt of court, and her conviction thereof was entirely warranted.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 77-247

HELEN FOLEY, Petitioner

v.

STATE OF NEW JERSEY, Respondent

On Petition for Writ of Certiorari
to the Superior Court of New Jersey,
Appellate Division

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

STATEMENT OF THE CASE

Petitioner affirms the above as set forth in her Petition for Writ of Certiorari and incorporates it as part of this.

REPLY TO ARGUMENT

The rebuttal to respondent's argument is as follows:

1. Point One of respondent's argument is erroneous in that he has misapprehended the correct application of the law to the facts at issue. His reasoning is general and not specific.

Respondent states in his Brief in Opposition: (Rb4)

> "Petitioner contends that the notice she received apprising her that she had been charged with contempt of court.... was insufficient pursuant to the New Jersey Court Rules."

and then rebuts the alleged contention by argument and case listing to the effect that the notice received by petitioner was adequate and sufficient to comply with constitutional requirements in general, stating at (Rb5):

> " Respondent submits that the notice afforded petitioner in the instant case clearly satisfied the requirements of due process."

Petitioner's reply to the above is that the respondent's argument was addressed to the issue in general even though his conclusion was stated in terms of "the instant case." She is contending that the State of New Jersey has guaranteed a particular procedural form in its Court Rule 1:10-2 and since this particular matter is penal in nature she has a right to the proper operation of said procedure which is guaranteed by the Due Process Clause of the Fourteenth Amendment. (Goldberg v. Kelly, 397 U.S.254 (1969)) (Ppll) This point was raised in the Petition but not answered by respondent. In further reply, she is not claiming that the notice which she did receive (letter from the assignment judge) was an

insufficient notice - but that it was an improper notice under the State Court Rules and thus violated her constitutional rights. (Ppll-13)

At(Rb6,7) respondent seems to be arguing that the court below had proceeded under Rule 1:10-1, and he states:

> "The decisions of other New Jersey Courts, however, clearly indicate that the procedure referred to in R.1-10-2 was not required in the instant case."

and then continues for a full page with argument and case listings proving that a contempt committed in "the actual presence" of the court may be dealt with without an order to show cause and that the mailing of a letter to a judge or clerk of the court is such an "actual presence". But when he further states on (Rb7) that:

"The recent decision of State v. Sax, 139 N.J. Super.157,353 A2d 113 (App.Div.

1976), is directly on point and dispositive of the instant case."

he is in error because it is not directly on point and dispositive of the instant case for the following differences:

Sax Case	Instant Case
1. Letter addressed to Clerk of Municipal Court	1. Wording on parking ticket
2. Municipal judge found defendant guilty of contempt, summarily, himself.	2. Municipal judge forwarded the matter to another.
3. Defendant present at trial with attorney	3. Trial unattended by petitioner

(above facts listed in respondent's Statement of Facts and Argument)

He argues further, in the alternative, assuming that the proceedings should have been instituted under R.1:10-2 that in Van Sweringen v. Van Sweringen_, 22 N.J. 440,444, 126 A.2d 334 (1956)"the New Jersey Supreme Court stated that the crucial

emphasis in contempt proceedings should be placed upon notice and a fair hearing."

A search of that particular page does not reveal the wprd "crucial" being used but the following citation from the same page does show the context in which a similar clause was used. It is in pertinent part:

> "... only three issues demand consideration:
> 1. Is a sworn affidavit supporting an order to show cause why punishment should not be imposed upon the alleged contemnor a jurisdictional requisite? ....
>
> 1. ..... There has not been a uniform practice in this State nor the country at large in requiring a sworn statement reciting the facts upon which the alleged contempt is based. .... The rules of court relevant to criminal contempt do not express the requirement, ... and, as stated below, emphasis today is placed upon notice and a fair hearing. Katz was fully apprised of the charge against him and was afforded ample opportunity to prepare his defense. He was not denied a fair hearing through the absence of a sworn statement."

(underline added)

It is obvious from the above that an order to show cause was issued to the contemnor and that the underlined sentence concerning the non denial of a fair hearing was a reference to the lack of a sworn statement thereto, and not authority for dispensing with formal notice generally, as implied by respondent.

Respondent continues to interpret the Van Sweringen case stating: (Rb8)

> "The court in Van Sweringen, supra ruled that minor irregularities in the preliminary procedural steps do not justify a reversal unless some substantial prejudice is suffered by a defendant."

If, by this, he is implying that the lack of an order to show cause in the instant case is a minor irregularity, petitioner is unable to make the same interpretation. In fact, she gets the opposite impression from the same court's statement at 447:

> " Where, however, the contempt is not within the presence of the court, the course is to follow more rigidly the traditional demands of due process."

Petitioner further contends that the failure of the court to institute an order to show cause was not a minor irregularity - it was a jurisdictional flaw which the letter of the assignment judge could not cure. This is borne out by the following from the New Jersey Court Rules: (in pertinent part)

> "R.4:67-3. Service of Order to Show Cause
> If the order to show cause issues ex parte pursuant to R. 4:67-1a,(to all actions in which the court is permitted by rule or statute to proceed in a summary manner,...) no summons shall issue unless the court otherwise orders. Process shall be a copy of the order to show cause,.."

(underline added)

In conclusion, petitioner contends that this matter is not just one of local law wherein a state court has made a wrong

decision but involves a 14th Amendment due process right as a statutory entitlement, which respondent has not refuted.

2. Point II of respondent's argument is erroneous and irrelevant since it is addressed to an argument which petitioner never made.

It is headed:

> "Petitioner's guilt of contempt of court was established beyond a reasonable doubt." (Rb10)

Under which it begins:

> "Petitioner argues that her guilt of contempt of court was not established at the proceeding below. Specifically she contends that it was never demonstrated that she possessed the requisite intent to commit the contempt in question."

This is erroneous since petitioner never so argued in this Court. That would only have been an error of the state court and therefore not appealable as a federal question. What she did argue

in Point II of her Petition was that the holding of her trial (in absentia) under the circumstances of the case was a violation of the Due Process Clause in that she was not afforded an opportunity to present evidence in her own defense. The issue of intent was only cited as an example of such deprivation - not as an argument per se. Since respondent has not addressed himself to the real issue raised by petitioner, it must be assumed that it is because he has no argument. His entire argument in defense of the trial and conviction is irrelevant.

JURISDICTION

This is a case where the federal issue was raised at the inception of the appeal and the decision was based upon federal and non federal grounds but respondent

has not argued that the non federal ground is independent of the federal and adequate to support the judgment. Petitioner says that the federal question is unanswered.

CONCLUSION

In view of the fact that the issue has to do with basic constitutional rights and the decision will set a precedent on a statewide basis, the need for plenary review of the matter is urgent.

Helen Foley

Helen Foley, pro se

Dated 27 Sept. 1977